Goo Sing Kar v Dato' Lim Ah Chap & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02–119 OF 2008
ABDUL MALIK ISHAK, CLEMENT SKINNER JJCA AND MOHAMAD ARIFF J
1 OCTOBER 2012

B

C

Civil Procedure — Damages — Damages for inconvenience and embarrassment suffered by corporate entities — Whether High Court judge erred in awarding damages under this head

D

Civil Procedure — Injunction — Interim injunction — Interim injunction granted with undertaking that appellant would pay damages in respect of same — Injunctions set aside — Assessment of damages on undertaking to pay damages — Concurrent findings by deputy registrar and High Court judge — Appellant appealed against assessment of damages — Whether sum of RM17m awarded as damages on undertaking to pay damages was warranted — Whether there was error in law or failure of appreciation of evidence by deputy registrar or High Court judge — Whether quantification of damages was based on sound principles of law

E

At all material times, Goo Sing Kar ('the appellant') had owned 50% of the shares in TK Mining Sdn Bhd (TKM) while Dato' Lim Ah Chap ('the respondent') owned the remaining 50% of the shares. The appellant brought a derivative action on behalf of TKM and its shareholder against the respondent and others. The appellant then instituted three other civil suits, which were all instituted as derivative actions on behalf of TKM, against the respondent and others. Thereafter, the appellant applied for and was granted four interlocutory injunctions ex parte with the undertaking that he would pay damages in respect of the said interlocutory injunctions. The interim injunctions were set aside on ex parte applications being made by the respondent and the respective defendants in the four civil suits. In setting aside the injunctions it was ordered that an immediate enquiry be made into damages arising from the appellant's undertaking to pay damages. The deputy registrar assessed the damages to be awarded to the respondents as RM17,887,038.70. The appellant appealed against the assessment of damages. The High Court judge dismissed the appeal but reduced the amount of damages marginally to RM17,847,041.60 to correct a mathematical error. The present appeal was against the High Court judge's dismissal of the appellant's appeal. The appellant argued that the sum of RM17m awarded as damages on the undertaking to pay damages for an interim injunction that operated for a mere 14 days until it was set aside was excessive. It was the appellant's contention that the calculation of damages by

F

G

H

I

A the deputy registrar and the High Court judge was unsubstantiated and that the High Court judge had failed to consider adequately the evidence in this case.

Held, dismissing the appeal and ordering the sum of RM50,000 as fixed costs:

B

(1) (per **Abdul Malik Ishak JCA**) The appellant's undertaking that he would pay damages in respect of the said interlocutory injunctions was not an undertaking between the parties but rather an absolute undertaking given by the appellant to the court to compensate the respondent for all C losses or damages, which in the opinion of the court was caused as a result of the injunction. That being the case, the appellant was liable for any damages which the respondent would have sustained. Sufficient evidence had been led in the present case to show that the appellant had obtained the ex parte injunctions in a deceitful way and with malicious intent. As D such, the appellant should be held responsible for all losses directly caused by the ex parte injunctions regardless of its forseeability (see paras 14 & 19).

(2) The principle that the court would be disinclined to reverse the finding of E the trial judge as to the amount of damages should apply. On the facts of this appeal, there were concurrent findings by the deputy registrar and the High Court judge and it was a general principle that save in the most exceptional circumstances this court would not upset concurrent findings. The appellant had failed to demonstrate to that degree of F conviction required by this general principle that there had been any serious error of principle on the part of the High Court judge when he heard the appeal from the assessment of damages by the deputy registrar (see paras 29, 33–34).

G (3) Due consideration was given to the specific principles in relation to the issue of damages on an undertaking as to damages. In the present appeal the dispute concerned an issue of causation. The causal link between the undertaking to pay damages and the damages of RM17m awarded by the deputy registrar and likewise the concurrent findings of the High Court H judge was established in a factual matrix where the appellant had obtained the four interlocutory injunctions ex parte with deceit; in one glaring instance he had obtained one of the interlocutory injunctions on the basis of an action which had in fact been discontinued. As such, although the interim injunctions granted only operated for 14 days, the I duration per se could not be regarded as the determining factor. Further, contrary to the appellant's contentions, the record disclosed that the High Court judge had meticulously sifted through the evidence in a detailed judgment, and based his confirmation of the award of damages on sound principles of law. In these circumstances there was no error in

law or any failure of appreciation of the evidence on the part of the High Court judge or the deputy registrar (see paras 42, 45 & 55).

(4) The largest component of the damages related to the damages of RM15m awarded to the respondent for the losses suffered by all the companies within the group of companies initially owned by the respondent. The evidence was clear that the business of the companies in the entire group came to a standstill since the banks were unwilling to provide banking facilities because of the interlocutory injunctions. It was evident that the appellant knew that the companies would not have been able to survive without the banking facilities and he should be held liable on his undertaking to pay damages. Although the damages awarded to the respondent appeared to be excessive, the appellant should in law be held liable on the undertaking for this large sum as the figure of RM15m awarded in respect of the losses suffered by all the companies within the group of companies could be justified on sound principles (see paras 44, 51–52).

(5) The other heads of damages were likewise supportable on sound principles for quantification of damages, in particular in calculating damages with reference to interest for loss of use of monies. The High Court judge had also rightly awarded damages for inconvenience and embarrassment since the law now recognised that corporate entities could also sue and recover damages under this category, which would be reflected in its goodwill. Thus the sum of RM17m awarded as damages on the undertaking to pay damages was warranted in the special circumstances of this case (see paras 53–54).

[Bahasa Malaysia summary

Pada kesemua masa material, Goo Sing Kar ('perayu') memiliki 50% daripada saham TK Mining Sdn Bhd ('TKM') manakala Dato' Lim Ah Chap ('responden') memiliki baki 50% saham. Perayu membawa tindakan terbitan bagi pihak TKM dan pemegang sahamnya, terhadap responden dan lain-lain. Perayu kemudian memulakan tiga guaman sivil yang lain, yang kesemuanya dimulakan sebagai tindakan terbitan bagi pihak TKM, terhadap responden dan lain-lain. Perayu kemudiannya memohon dan telah diberikan empat injunksi interlokutori ex-parte dengan akujanji bahawa dia akan membayar ganti rugi bagi injunksi interlokutori. Injunksi interim telah diketepikan atas permohonan ex parte yang dibuat oleh responden dan defendan-defendan dalam empat guaman sivil tersebut. Dalam mengetepikan injunksi-injunksi, siasatan segera diperintahkan dibuat ke atas kerugian yang berbangkit daripada akujanji perayu untuk membayar ganti rugi. Timbalan pendaftar menaksir ganti rugi untuk diawardkan kepada responden sebanyak RM17,887,038.70. Perayu merayu terhadap taksiran ganti rugi. Hakim Mahkamah Tinggi menolak rayuan tersebut tetapi mengurangkan jumlah ganti rugi secara margin kepada RM17,847,041.60 untuk memperbetulkan kesilapan matematik.

A Rayuan ini adalah terhadap keputusan hakim Mahkamah Tinggi bagi rayuan perayu. Perayu menghujahkan bahawa jumlah RM17 juta yang diawardkan sebagai ganti rugi berdasarkan akujanji untuk membayar ganti rugi bagi injunksi interim yang beroperasi untuk hanya 14 hari sehingga diketepikan adalah berlebihan. Adalah hujahan perayu bahawa pengiraan ganti rugi oleh
B timbalan pendaftar dan hakim Mahkamah Tinggi adalah tidak berasas dan bahawa hakim Mahkamah Tinggi telah gagal untuk mempertimbangkan keterangan dalam kes ini dengan secukupnya.

C **Diputuskan**, menolak rayuan dan memerintahkan jumlah RM50,000 sebagai kos tetap:

(1) (oleh **Abdul Malik Ishak HMR**) Aku janji perayu yang dia akan membayar ganti rugi berkaitan injunksi interlokutori tersebut bukan aku janji di antara pihak-pihak tetapi lebih kepada aku janji mutlak diberi
D oleh perayu kepada mahkamah untuk memberi pampasan kepada responden untuk kesemua kerugian atau ganti rugi, yang mana dalam pandangan mahkamah disebabkan akibat injunksi tersebut. Oleh itu, perayu bertanggungjawab untuk apa-apa ganti rugi yang mana dialami oleh responden. Keterangan yang mencukupi telah dikemukakan di
E dalam kes ini untuk menunjukkan bahawa perayu telah memperolehi injunksi secara penipuan dengan berniat jahat. Dengan demikian, perayu patut bertanggungjawab untuk kesemua kerugian disebabkan oleh injunksi ex parte tanpa menghiraukan 'jangkaannya' (lihat perenggan 14 & 19).

F (2) Prinsip bahawa mahkamah perlahan dalam mengakas dapatan hakim bicara bagi jumlah ganti rugi perlu dipakai. Berdasarkan fakta dalam rayuan ini, terdapat dapatan serentak oleh timbalan pendaftar dan hakim Mahkamah Tinggi dan ia adalah satu prinsip umum melainkan dalam
G keadaan luar biasa yang mana mahkamah tidak akan mengganggu dapatan serentak. Perayu telah gagal untuk membuktikan hingga tahap yakin yang dikehendaki oleh prinsip umum ini bahawa tidak terdapat sebarang kesilapan prinsip yang serius di pihak hakim Mahkamah Tinggi apabila beliau membicarakan rayuan taksiran ganti rugi oleh timbalan
H pendaftar (lihat perenggan 29, 33–34).

(3) Pertimbangan wajar telah diberikan kepada prinsip-prinsip tertentu berhubung isu ganti rugi berdasarkan aku janji untuk ganti rugi. Dalam rayuan ini pertikaian adalah berkenaan isu penyebaban. Hubungan penyebaban antara akujanji untuk membayar ganti rugi dan ganti rugi
I RM17 juta yang diawardkan oleh timbalan pendaftar dan begitu juga dapatan serentak hakim Mahkamah Tinggi telah dibuktikan dalam fakta matriks di mana perayu telah memperolehi empat injunksi interlokutori ex parte secara menipu, dalam satu contoh ketara yang mana dia telah memperoleh salah satu injunksi interlokutori berasaskan satu tindakan

yang sebenarnya telah dihentikan. Oleh itu, walaupun injunksi interim yang diberikan hanya beroperasi selama 14 hari, tempoh, semata-mata, tidak boleh dianggap sebagai faktor penentu. Di samping itu, bertentangan dengan hujahan perayu, rekod menunjukkan bahawa hakim Mahkamah Tinggi telah membuat pertimbangan teliti ke atas keterangan dalam penghakiman yang terperinci, dan berdasarkan pengesahannya ke atas award ganti rugi berdasarkan prinsip-prinsip undang-undang yang kukuh. Dalam hal keadaan ini, tiada kesilapan dalam undang-undang atau sebarang kegagalan untuk mempertimbangkan keterangan oleh hakim Mahkamah Tinggi mahupun timbalan pendaftar (lihat perenggan 42, 45 & 55).

(4) Komponen terbesar ganti rugi adalah berkenaan ganti rugi RM15 juta yang diberikan kepada responden atas kerugian yang dialami oleh syarikat-syarikat dalam kumpulan syarikat-syarikat yang pada asalnya dimiliki oleh responden. Keterangan-keterangan adalah jelas bahawa perniagaan syarikat-syarikat dalam keseluruhan kumpulan terhenti kerana bank-bank tidak sanggup menyediakan kemudahan perbankan akibat injunksi interlokutori. Jelas bahawa perayu mengetahui bahawa syarikat-syarikat tidak akan dapat bertahan tanpa kemudahan perbankan dan dia harus bertanggungjawab ke atas akujanjinya untuk membayar ganti rugi. Walaupun ganti rugi yang diberikan kepada responden kelihatan berlebihan, perayu perlu, di bawah undang-undang, bertanggungjawab ke atas akujanji bagi jumlah yang besar ini kerana jumlah RM15 juta yang diawardkan bagi kerugian yang dialami oleh syarikat-syarikat dalam kumpulan syarikat-syarikat boleh diasaskan pada prinsip-prinsip yang kukuh (lihat perenggan 44, 51–52).

(5) Tajuk-tajuk ganti rugi yang lain juga boleh disokong oleh prinsip-prinsip kuantifikasi ganti rugi yang kukuh, khususnya dalam pengiraan ganti rugi merujuk kepada faedah ke atas kerugian kerana penggunaan wang. Hakim Mahkamah Tinggi juga telah mengawardkan ganti rugi atas kesulitan dan malu dengan tepat kerana undang-undang kini mengiktiraf bahawa entiti korporat juga boleh membawa guaman dan mendapatkan ganti rugi di bawah kategori ini, yang mana akan dapat dilihat menerusi nama baiknya. Oleh itu, jumlah RM17 juta yang diawardkan sebagai ganti rugi berdasarkan akujanji untuk membayar ganti rugi adalah wajar dalam hal keadaan kes ini (lihat perenggan 53–54).]

Notes

For cases on interim injunction, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3642–3730.

Cases referred to

Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1981) 146 CLR 249; (1979) 33 ALR 578, HC (refd)

Albacruz (Cargo Owners) v Albazero (Owners), The Albazero [1977] AC 774, HL (refd)
Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 AC 518, HL (refd)
American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)
Banco de Portugal v Waterlow And Sons Ltd [1932] AC 452, HL (refd)
Bonham-Carter v Hyde Park Hotel Limited (1948) 64 TLR 177, KBD (refd)
British Transport Commission v Gourley [1956] AC 185, HL (refd)
Cheltenham & Gloucester Building Society v Ricketts and Others [1993] 4 All ER 276, CA (refd)
Commodity Ocean Transport Corporation v Basford Unicorn Industries Ltd (The 'Mito') [1987] 2 Lloyd's Rep 197, QBD (refd)
Digital Equipment Corp v Darkcrest Ltd and another [1984] 1 Ch 512, Ch D (refd)
Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158, CA (refd)
General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd [1975] 1 WLR 819, HL (refd)
Johnson Control Systems Ltd v Techni-Track Europa Ltd (in administrative receivership) [2003] EWCA Civ 1126, CA (refd)
Koufos v C Czarnikow Ltd, The Heron II [1969] 1 AC 350, HL (refd)
Livingstone v The Rawyards Coal Company (1880) 5 App Cas 25, HL (refd)
Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd [2003] 1 MLJ 6, CA (refd)
Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker [1949] AC 196, HL (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (refd)
Newby v Harrison (1861) 3 De GF & J 287 (refd)
Smith v Day (1882) 21 Ch D 421, CA (refd)
Sunseekers Pte Ltd v Joshua [1990] 2 MLJ 350, HC (refd)
Swingcastle Ltd v Alastair Gibson (a firm) [1991] 2 AC 223, HL (refd)
Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd [2011] 4 MLJ 593; [2010] 9 CLJ 400, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Ushers Brewery Ltd v PS King & Co (Finance) Ltd [1972] Ch 148, Ch D (refd)
Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, CA (refd)
Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2012] 5 CLJ 229, CA (refd)

Appeal from: Suit Nos 22–52, 22–94, 22–95 and 22–96 of 2001 (High Court, Kuantan)

Legislation referred to

Rules of the High Court 1980 O 56

Wong Kian Kheong (Khoo Kay Ping and Karin Lim with him) (Zaid Ibrahim & Co) for the appellant.
Cyrus V Dass (David Dinesh Mathew with him) (Shook Lin & Bok) for the respondents.
Jacob Goldie (Jacob Goldie SS Chew) for the respondents.

Abdul Malik Ishak JCA (delivering supporting judgment):

[1] This is my supporting judgment to that of the judgment of Dato' Mohamad Ariff bin Md Yusof JHC wherein this court dismissed the appeal of the appellant plaintiff with fixed costs of RM50,000 before this court as well as before the deputy registrar and before the High Court judge. The decision of the High Court was affirmed and the deposit should rightly go to the respondents/defendants.

[2] The measure of damages to be awarded to an aggrieved party has been restated in many ways by Viscount Sankey LC in *Banco de Portugal v Waterlow And Sons Ltd* [1932] AC 452 (HL) at p 474; by Lord Wright in *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196 (HL)at p 221; by Earl Jowitt in *British Transport Commission v Gourley* [1956] AC 185 (HL) at p 197; by Lord Upjohn in *Koufos v C Czarnikow Ltd, The Heron II* [1969] 1 AC 350 (HL) at p 420; by Lord Wilberforce in *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 (HL); by Lord Lowry in *Swingcastle Ltd v Alastair Gibson (a firm)* [1991] 2 AC 223 (HL) at p 232D; and by Lord Jauncey of Tullichettle in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL) at p 562G. And all these eminent Law Lords derived their inspiration from the speech of Lord Blackburn in *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 (HL) at p 39 when His Lordship said about the measure of damages in these erudite terms:

> that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[3] Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA) at p 539 aptly said about the measure of damages in this way:

> It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed.

[4] Lord Diplock in *Albacruz (Cargo Owners) v Albazero (Owners), The Albazero* [1977] AC 774 (HL) at p 841C described the purpose of awarding damages in these words:

> to put the person whose right has been invaded in the same position as if it had been respected so far as the award of a sum of money can do so.

[5] This appeal concerned the damages awarded against the appellant based on the appellant's undertaking to pay damages pursuant to the four interim injunctions. There were concurrent findings by the deputy registrar and the High Court judge and there were no exceptional circumstances shown to warrant any interference by this court.

[6] In this appeal, the appellant who was the plaintiff at the High Court, had obtained four ex parte injunction orders which effectively destroyed the companies belonging to the first respondent — Dato' Lim Ah Chap. The injunction orders were couched in extremely wide terms and circulated to the banks thereby cutting off the credit lines and banking facilities enjoyed by the companies.

[7] Earlier on, the companies had been sold to the first respondent by the appellant and that sale saw the appellant divesting his 50% stake in the companies under the settlement agreement entered between the appellant and the first respondent. The injunction orders effectively destroyed the companies which the appellant had earlier sold to the first respondent.

[8] It was an undisputed fact that the companies had a value of RM40m. This was admitted by the appellant at the inquiry before the deputy registrar.

[9] The injunction orders were eventually set aside by Dato' Ramly Ali JC (now JCA) as reflected in his judgment which has since been reported (see [2002] MLJU 79, [2002] 2 CLJ 250). In his judgment, His Lordship made critical observations pertaining to the appellant's conduct and he also directed an immediate enquiry into damages based on the undertaking as to damages given by the appellant.

[10] The deputy registrar conducted the enquiry where 17 witnesses were called and the notes of evidence spilled to over 185 pages. At the end of that enquiry, the deputy registrar awarded damages totalling RM17,887,038.70 to all the respondents. Aggrieved, the appellant appealed to the High Court judge pursuant to O 56 of the Rules of the High Court 1980. His Lordship Dato' Abdul Halim Aman, High Court judge, upheld the award of the deputy registrar but reduced it to a correct mathematical figure of RM17,847,041.60. Aggrieved, the appellant now appeals to this court.

[11] The undertaking as to damages given by the appellant must 'be worth powder and shot' (*Commodity Ocean Transport Corporation v Basford Unicorn Industries Ltd (The 'Mito')* [1987] 2 Lloyd's Rep 197 at p 198) and the ability of the appellant to honour his undertaking was a material factor in the balance of convenience (see the *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL) at p 510).

[12] The true nature of the undertaking was explained by Turner LJ in *Newby v Harrison* (1861) 3 De GF & J 287 at p 290 in this way:

> The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the court, not merely in the suit but absolutely; that the undertaking is an absolute undertaking that he will be liable for any damages which the opposite party may have sustained, in case the court shall ultimately be of opinion that the order ought not to have been made.

[13] It must be borne in mind that the undertaking is not between the parties. Rather it is between the party giving the undertaking and the court.

[14] The purpose of the undertaking can be described in this way. In the event the interlocutory injunction is being discharged, the plaintiff has to compensate the defendant for all losses or damages which the court is of the opinion was caused as a result of the injunction. According to *Halsbury's Laws of England*, (4th Ed) Vol 24, at para 1072, it is the price which the person asking for an interlocutory injunction has to pay for it. Such an undertaking is an absolute undertaking. And that being the case, the appellant here will be liable for any damages which the first respondent may have sustained.

[15] And according to Plowman J in *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] Ch 148 at p 154C, the undertaking becomes enforceable by way of an inquiry as to damages in the following sets of circumstances:

(a) when the plaintiff has failed on the merits at the trial; or

(b) when it is established before trial that the injunction ought not to have been granted in the first place; or

(c) when it is established, after trial, by an unsuccessful defendant, that the injunction ought not to have been given.

[16] It was argued that the ex parte injunctions lasted for only 14 days and it was perplexing how that could have caused the respondents to suffer any loss. But the deceit and the non-disclosure of material facts as alluded to by my learned brother Dato' Mohamad Ariff bin Md Yusof JHC were the special features of this case that made it different from the rest. It must be borne in mind that damages for deceit are not limited to those categories which are

reasonably foreseeable. In fact, the damages recoverable can include consequential loss suffered by reason of wide circulation to the banks (*Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA)). The measure of damages for deceit falls in a special category regulated by the principles of *Doyle*.

[17] The following principles ought to apply in assessing the damages payable by the appellant when there were deceit and the non-disclosure of material facts bordering on fraudulent conduct which were circulated to the banks:

(a) the appellant must make reparation of all the damages directly flowing from it;

(b) although the damages need not have been foreseeable, yet it must have been directly caused by the appellant;

(c) in assessing the damages, the first respondent is entitled to recover the full purchase price paid by the first respondent for purchasing the companies from the appellant; and

(d) the first respondent is also entitled to recover consequential loss caused by the appellant and incurred by the first respondent.

[18] This is a case where the appellant has obtained the ex parte injunctions in a deceitful way and with malicious intent. With respect, the appellant should be held responsible for all losses directly caused by the ex parte injunctions regardless of its foreseeability.

[19] Sufficient evidence was led to demonstrate the damages incurred by all the respondents. This was not the case where the respondents wrote down the particulars of their damages and threw them to the court and demanded for it (to borrow the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177).

[20] For the reasons adumbrated above, I fully support the judgment of my learned brother Dato' Mohamad Ariff bin Md Yusof JHC and the orders made by him.

Mohamad Ariff J (delivering judgment of the court):

PROCEDURAL BACKGROUND

[21] In this appeal, four different suits were consolidated, namely Civil Suits Nos 22–52 of 2001, 22–94 of 2001, 22–95 of 2001 and 22–96 of 2001. The plaintiff, now the appellant, purportedly brought these four derivative actions on behalf of TK Mining Sdn Bhd and its shareholder. In Suit No 22–52 of

2001, TK Mining Sdn Bhd appeared as a nominal third defendant. The first defendant in all the suits was one Datuk Lim Ah Chap who, at the material times, owned 50% of the shareholding of TK Mining Sdn Bhd with the appellant/plaintiff owning the other 50%. In respect of Suit No 22–52 of 2001, the other defendants were Minat Deras Sdn Bhd, Hormat Abadi Sdn Bhd, Impianox Sdn Bhd, and three other persons (Ahmad Al Kamar bin Mohd Baria, Abdul Halim bin Jalil and Irdawati bt Muhammad Ishak). These three other persons were sued as essentially nominees of Datuk Lim Ah Chap. In respect of the other suits, the defendants, aside from Datuk Lim, were:

(a) 22–94 of 2001
TK Sawmill Trading Sdn Bhd (as the second defendant);

(b) 22–95 of 2001
Seng Chap Wah Timber Merchant Sdn Bhd (as the second defendant); and

(c) 22–96 of 2001
Metro Istimewa Sdn Bhd (as the second defendant).

[22] These three other civil suits, like Civil Suit No 22–52 of 2001, were all instituted as derivative actions for and on behalf of TK Mining Sdn Bhd.

SUBJECT MATTER: ASSESSMENT AND AWARD OF DAMAGES ON THE PLAINTIFF'S UNDERTAKING TO PAY DAMAGES IN RELATION TO INTERIM INJUNCTIONS

[23] This appeal concerned an assessment of damages based on the plaintiff's undertakings to pay damages in relation to four interim injunctions that had been granted by the High Court in his favour in each of the separate suits mentioned earlier. These interim injunctions were granted on 10 January 2002 on ex parte applications by the plaintiff. All were set aside on 24 January 2002 on ex parte applications being made by the respective defendants. The learned judicial commissioner (now Ramly Ali JCA), in setting aside the injunctions, also ordered that an immediate enquiry into damages arising from the undertaking to pay damages be assessed by the deputy registrar. The decision of the learned judicial commissioner is reported in [2002] MLJU 79; [2002] 2 CLJ 250. The deputy registrar conducted the enquiry which involved 17 witnesses and some 185 pages of notes of evidence. By the registrar's certificate, damages totalling RM17,887,038.70 was awarded to all the respondents.

[24] The plaintiff then appealed to the High Court judge under O 56 of the Rules of the High Court 1980. The High Court judge dismissed the appeal, but reduced the amount of damages marginally to RM17,847,041.60 to correct a mathematical error.

[25] The full particulars of the damages ordered to be paid are as follows:

(a) damages for inconvenience and embarrassment awarded to each of the respondents in the sum of RM20,000 each, totalling RM220,000;

(b) RM15m as damages to Datuk Lim Ah Chap ('the first respondent') for losses suffered by TK Mining Sdn Bhd, TK Sawmill Sdn Bhd, Minat Deras Sdn Bhd, Hormat Abadi Sdn Bhd, and Impianox Sdn Bhd (all these companies comprised companies within the group of companies initially owned by Dato' Lim Ah Chap and the appellant);

(c) damages for loss of banking facilities to TK Mining Sdn Bhd in the sum of RM600,000;

(d) damages for loss of banking facilities to TK Sawmill Sdn Bhd in the sum of RM340,000;

(e) damages for the loss of banking facilities to Metro Istimewa Sdn Bhd in the sum of RM20,000; and

(f) damages for loss of profits for the development project of Metro Istimewa Sdn Bhd in the sum of RM1,667,041.60.

[26] As earlier noted the total sum awarded, as confirmed by the learned High Court judge, was RM17,847,041.60. The learned deputy registrar had earlier ordered RM17,887,038.70. The High Court judge awarded the lesser figure after noting there was a mathematical error in calculating the total sum ordered.

[27] This present appeal by the plaintiff/appellant before the Court of Appeal was against the dismissal of the plaintiff's appeal by the learned High Court judge.

THIS COURT'S DECISION

[28] We dismissed the appeal on 24 May 2012 by a unanimous decision and ordered that the sum of RM50,000 fixed costs for this appeal, the costs of the appeal in the High Court Kuantan and the costs for the assessment of damages by the registrar of the High Court, be paid by the appellant to the respondents. The deposit of RM500 was ordered to be paid to the respondents. I now provide the grounds for this unanimous decision.

APPEAL FROM CONCURRENT FINDINGS ON DAMAGES

[29] Two preliminary matters require to be stated at the outset. First, the subject matter of the appeal concerned damages and its quantum, and therefore the principle that the court will be disinclined to reverse the finding

of the trial judge as to the amount of damages should apply. The findings of the trial judge should not be reversed merely because the appellate court might be of the opinion that if they had tried the case at first instance they would have given a lesser sum. Counsel for the respondents, Dato' Cyrus V Dass, cited the oft-quoted statements of the Federal Court in *Topaiwah v Salleh* [1968] 1 MLJ 284, reading:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.

[30] More recently, the Court of Appeal has reaffirmed these principles in *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229, where Mohamad Apandi Ali JCA stated:

> As the appellate court, we are mindful that since the assessment of damages is an exercise of judicial discretion, such assessment is seldom disturbed unless there is clear error on the principles of law or that the amount is erroneous and without any basis and justification. On this approach, we are reminded of what Greer LJ said in *Flint v Lovell* [1935] 1 KB 354, which reads as follows:
>
> > … the court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages, it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled (at pp 236–237 of the report)

[31] See also an earlier Court of Appeal decision in *Tanjung Tiara Sdn Bhd v Paragro Sdn Bhd* [2011] 4 MLJ 593; [2010] 9 CLJ 400, where the Court of Appeal expressed its reluctance to interfere with findings of facts by the learned High Court judge in relation to assessment of damages:

> The award of damages by the learned trial judge is primarily based on his finding of facts in the light of the evidence adduced at the trial. In the light of two conflicting versions, he has accepted the evidence adduced for the plaintiff company and rejected the defendant's evidence. As a trier of facts, the learned judge is entitled to do so. There is no reason for us to disturb his findings of facts …
>
> In *Amar Singh v Chin Kiew* [1960] 1 MLJ 77; [1960] 1 LNS 5, Thomson CJ stated succinctly as follows:

> The fixation of damage is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent, an exercise of judicial discretion …
>
> (at pp 409–410 of the report)

[32] Thus, for the appellant to succeed he must show either (a) the trial judge has acted on some wrong principle of law, or (b) the trial judge has made an entirely erroneous estimate of the damages in the sense that it is so extremely high or so very small.

[33] The second preliminary matter concerned concurrent findings. On the facts of this appeal, there were concurrent findings of the deputy registrar and the High Court judge, and again I took note of the general principle, established by the Court of Appeal, that save in the most exceptional circumstances, the Court of Appeal will not upset concurrent findings. In *Milik Perusahaan Sdn Bhd & Anor v Kembang Masyur Sdn Bhd* [2003] 1 MLJ 6, for instance, this court has held as follows:

> … it is a general principle upon which this court acts that save in most exceptional circumstances, concurrent findings of fact will not be gone into by us. But that is not to say that an appeal of this nature will never succeed. If the appellant can sufficiently demonstrate to a conviction that a serious error of principle has occurred in both the lower tiers of the High Court, this court will have no hesitation; and indeed we are duty-bound to correct the resultant error (at p 12 of the report)

[34] On the facts of this present appeal, we found that the appellant had failed to demonstrate to that degree of conviction required by this general principle that there had been any serious error of principle on the part of the High Court judge when he heard the appeal from the assessment of damages by the deputy registrar.

[35] It is further a well-established principle that a court in assessing the quantum of damages to be awarded exercises a discretionary jurisdiction, for the quantification of damages cannot proceed on the basis of mathematical certainty. These general principles, with respect, should apply in regard to an assessment of damages based on an undertaking to pay damages in an injunction matter. That said, the assessment and award of damages on the undertaking to pay damages are governed by specific additional principles addressed below.

SPECIFIC PRINCIPLES APPLICABLE IN RELATION TO AN UNDERTAKING TO PAY DAMAGES

[36] We took note of the observation made by counsel for the appellant that

the principles to be applied by the courts in relation to assessment of damages on an undertaking to pay damages had not been fully canvassed in our jurisdiction. Counsel argued that we should therefore seize the opportunity in this case to carefully define the applicable principles in the special context of this case where damages awarded was in the sum of over RM17m for an interim injunction which operated for a mere 14 days until it was set aside. In particular, it was strongly argued before us that the court should only award damages which are caused by the injunction and its continuation as distinguished from damages which arise from the existence and course of the litigation. Counsel relied very heavily on the decision of the High Court of Australia in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249; (1979) 33 ALR 578, in particular the passage in the judgment by Gibbs J reading:

> In a number of authorities the court has distinguished between loss which was caused by the injunction and loss which arose from the litigation … There is no reason to doubt that it is correct in principle to draw such a distinction if the facts warrant it. If the pendency of the litigation, rather than the making of the order, was the cause of the plaintiff's loss, the terms of the undertaking have no application, since the plaintiff has not sustained loss by reason of the order. Moreover, except in certain cases analogous to malicious prosecution, the defendant is not entitled to recover damages for loss resulting from legal proceedings brought against him — the only liability of the unsuccessful plaintiff is to pay costs. The court should no doubt scrutinise with care an assertion by the plaintiff that loss which has been suffered by the defendant has resulted from the litigation rather than from the making of the interlocutory order, since the plaintiff should not be allowed to evade payment of the price which he has agreed to pay for the grant of the injunction. In the end, however, the question becomes one of fact: did the making of the order cause the loss? The onus of proof must, in accordance with general principles, lie on the defendant who asserts that he sustained damage by reason of the order (at pp 581–582 of the report).

[37] Air Express Ltd was referred to and applied in *Sunseekers Pte Ltd v Joshua* [1990] 2 MLJ 350 by the High Court (Singapore), when it was also suitably noted: '… there must be a causal link between the injunction and the damage suffered … The onus of proof is on the defendant (see *Air Express v Ansett Transport Industries (Operations) Pty Ltd*' (per Chan Sek Keong J at p 351 of the report)).

[38] There was no real dispute between the parties as to the correctness of the principles in the *Air Express Ltd*'s case. I gave due consideration to this very persuasive case of the Australian High Court, and in the same vein also considered the other principles bearing on the issue, namely:

(a) an undertaking as to damages is 'the price which the person asking for an interlocutory injunction has to pay for it' (*Halsbury's Laws of England* (4th Ed), Vol 24, para 1072);

(b) the undertaking to pay damages is one given by the plaintiff to the court and the provider of the undertaking puts himself under the power of the court;

(c) the purpose of the undertaking is that, in the event of the interlocutory injunction being discharged, the applicant will have to compensate the opposing party for loss or damages which the court is of the opinion, was caused as a result of the injunction;

(d) the undertaking, though described as an undertaking as to damages, 'does not found any cause of action, but enables a party enjoined to apply to court for compensation if it is subsequently established that the interlocutory injunction should not have been granted' (*Cheltenham & Gloucester Building Society v Ricketts and Others* [1993] 4 All ER 276);

(e) the undertaking is an absolute undertaking that the applicant will be liable for any damages which the opposite party may have sustained; and

(f) if the interlocutory injunction has been obtained fraudulently or maliciously, the court will not confine itself to proximate damages, but can order exemplary damages (*Digital Equipment Corp v Darkcrest Ltd and another* [1984] 1 Ch 512, *Smith v Day* (1882) 21 Ch D 421).

[39] These specific principles in relation to the issue of damages on an undertaking as to damages were duly considered. Ultimately, this dispute concerns an issue of causation and that depends on the evidence before the learned deputy registrar and High Court judge hearing the appeal from the deputy registrar's decision on the assessment of damages.

OUR FINDINGS

[40] We were satisfied that the learned High Court judge had properly considered the evidence and the record did not disclose any error of law, perverse findings of fact or generally any findings which went against the weight of evidence. In our unanimous view, there was ample evidence to support the deputy registrar's decision on the quantum of damages awarded, and likewise the concurrent findings of the learned High Court judge.

[41] The issue ultimately being of causation, we were not persuaded that the somewhat limited duration of the interlocutory injunctions granted, ie 14 days, could not support the quantum of damages awarded. We were of the view that the duration per se could not be regarded as the determining factor. By way of illustration, in *Johnson Control Systems Ltd v Techni-Track Europa Ltd (in administrative receivership)* [2003] EWCA Civ 1126, for example, although the *Mareva* injunction lasted only approximately one week when set aside, sufficient damage had been done to the company which resulted in the court

awarding a high quantum of damages on the undertaking to pay damages. The English Court of Appeal (Civil Division) in awarding the high quantum of damages observed:

> Although the Mareva had been set aside on 23 of February, the relief came too late to save Europa from going into administrative receivership (Per Lord Justice Mantell, at para 4 of the judgment).

[42] In our view, the principal questions raised in this appeal concerned first, the issue of causation; secondly, whether the concurrent findings of the deputy registrar and the learned High Court judge was supported by the evidence and whether there was sufficient appreciation of the evidence; thirdly, whether the correct principles on the calculation of damages were applied by both in awarding the damages on the undertaking; and fourthly, whether the conduct of the plaintiff/appellant warranted the award of the damages in the circumstances.

[43] We were unanimously of the opinion that the learned High Court judge exercised his judicial discretion properly in respect of all the four principal questions noted above. We could not agree with the submissions of counsel for the appellant who tried to persuade this court that the findings of the judge were perverse on the evidence or that there were allegedly serious errors of law. To quote learned counsel for the appellant, Mr Wong Kian Kheong, we should allow the appellant's appeal for the following reasons in summary:

(a) there was no evidence the losses were actually caused by the four ex parte injunctions;

(b) the calculation of damages by the deputy registrar and the learned High Court judge was unsubstantiated; and

(c) the learned High Court judge failed to consider adequately the evidence in this case.

[44] Contrary to learned counsel's contentions, the record disclosed that the learned High Court judge meticulously sifted through the evidence in a detailed judgment, and based his confirmation of the award of damages on sound principles of law. The largest component of damages related to the damages of RM15m to Dato' Lim Ah Chap for the losses caused to the companies in the group of companies mentioned earlier. Because of the interlocutory injunctions, the business of the companies in the entire group came to a standstill since the banks were no longer willing to provide facilities to the main companies in the group, namely TK Mining Sdn Bhd, TK Sawmill Sdn Bhd and Metro Istimewa Sdn Bhd. The total facilities totalled about RM10m. We did not accept the appellant's reading of the evidence that it seemed the banking faculties were withdrawn even before the four

interlocutory injunctions were granted since the companies were already in default. We felt the evidence was clear that HSBC Bank was willing to review the banking facilities but for the interlocutory injunctions. The learned judge's assessment of the evidence provided by the independent witness from HSBC Bank could not be faulted. Aside from the independent evidence of a senior officer of the bank (Mdm Sivamany; SD5), there were letters from Messrs Skrine, who were solicitors for HSBC Bank, which reinforced the position that the bank was prepared to consider a review of the facilities. In the letter dated 2 November 2001, the solicitors had stated:

> Our clients (HSBC) state that they will be prepared to consider or review of the above if acceptable tangible security is provided and all disputes between Dato' Lim Ah Chap v Mr Goo Sing Kar are finally and completely resolved before 17.12.2001.

[45] The total value of the group of companies was in excess of RM40m — a fact admitted by the appellant himself. See appeal record, vol 2, at p 423.

[46] On this basis, the appellant had sold off his interest in the group of companies for RM13m to Dato' Lim Ah Chap, and entered into a settlement agreement which purported to settle the dispute between the parties in Civil Suit No 22–52 of 2001, in which there had been an earlier *Anton Filler* Injunction granted to the appellant. Indeed that suit was discontinued with a notice of discontinuance filed by both counsel for the parties.

SPECIAL FEATURE OF CASE: DECEIT AND NON-DISCLOSURE OF MATERIAL FACTS

[47] An important feature on the facts of this appeal was the fact that when the subsequent four injunctions were applied ex parte, one of the injunctions was premised on the discontinued suit! Counsel for the respondents, Dato' Cyrus V Dass, had impressed upon this court that this was a 'special feature' of this case. The ex parte injunctions were obtained by deceit, bordering on fraudulent conduct and were circulated to the banks. We were in agreement with Dato' Cyrus V Dass' submission on this. When the applications were made ex parte before Ramly Ali JC (now JCA), the appellant had suppressed the critical fact that there was a settlement agreement and that Suit No 22–52 of 2001 had been discontinued. This material non-disclosure led to the discharge and setting aside of the injunctions upon the ex parte application of the judge.

[48] Ramly Ali JC had the following to say in the reported decision in respect of the suppression of material facts:

Another very material fact that was not disclosed was about the settlement agreement between the plaintiff and Dato' Lim Ah Chap (the first defendant in all the four cases). Apparently there was dispute between the plaintiff and Dato' Lim Ah Chap. This dispute led to the filing of Suit No 22–52 of 2001 by the plaintiff against Dato' Lim Ah Chap and the other defendants. This settlement agreement according to the defendants' counsel is a global one ie, for settlement of all the disputes between them. In that settlement agreement, the plaintiff agreed to give up all his rights and liabilities in all the defendants' companies for a liquidated sum of RM13m to be paid by Dato' Lim Ah Chap. Apparently, the plaintiff was in breach of that settlement agreement and as such the defendants filed a Civil Suit No 22–93 of 2001 against the plaintiff, on 10 November 2001. Immediately after that, the plaintiff then filed three other suits against the defendants vide Civil Suits No 22–94 of 2001, 22–95 of 2001 and 22–96 of 2001 and applied for ex parte injunction (the subject matter of the present proceedings). *All these facts are material to the present proceedings and were not disclosed by the plaintiff when he applied for the ex parte injunction. In respect of Suit No 22–52 of 2001, it was also agreed in the settlement agreement that as a package settlement, the said suit would be discontinued. A notice of discontinuance was signed and filed by both counsels for the parties. Again, this fact was also not disclosed by the plaintiff.* In respect of all the four cases, the plaintiff complained about mismanagement of the main company ie, TK Mining Sdn Bhd. In fact in Suit No 22–52 of 2001 the plaintiff had applied for an appointment of a receiver and manager, which was duly granted by the court. The plaintiff had not disclosed to the court when he applied for the ex parte injunction that the receiver and manager, after having obtained all information from the relevant parties had concluded that the account of the said TK Mining Sdn Bhd were in order. Again this fact was not disclosed. *The plaintiff did not come with clean hands. He had failed to make full and frank disclosure. If the court had known all these relevant facts before making the ex parte iniunction on 10 January 2002, the court may not grant the order, especially some of the defendants are multi-million business concerns* … (Emphasis added.) (at pp 257–258).

[49] We noted that this particular suit was subsequently struck out on 12 June 2002.

[50] This background fact was also adverted to by Dato' Halim Aman J who noted at p 20 of the appeal record, Part A, that the applications were partly based on Civil Suit No 22–52 of 2001 which had been discontinued. At p 45, Dato' Halim Aman J made express reference to damages to be awarded where 'perintah injunksi yang mana telah diperolehi dengan cara yang tidak telus'.

[51] It was evident that the four injunctions applied ex parte were intended to cause damage to the companies in the group in which the appellant had disposed off his interest to the first defendant. He knew perfectly well the companies would not have been able to survive without the banking facilities. Since this was the scenario, the appellant must be held liable on his undertaking to pay damages. The appellant had obtained the injunctions fraudulently or

maliciously; the court should hold him responsible for all loss directly caused by the injunction. See *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158: 'The defendant is bound to make reparation for all the actual damages suffered, so far, again as money can do it … The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement … All such damages can be recovered, and it does not lie in the mouth of the fraudulent person to say that they could not be reasonably foreseen …' (at p 167).

[52] Damages awarded of RM17,847,041.60 appeared superficially to be excessive for the short duration of 14 days, but where maximum damage resulted with the intent that it should result, the appellant must in law be liable on the undertaking for this large sum. It was admitted by him that the group of companies had the value of some RM40m. The figure of RM15m awarded in respect of the head of losses suffered by TK Mining Sdn Bhd, TK Sawmill Sdn Bhd, Minat Deras Sdn Bhd, Hormat Abadi Sdn Bhd, and Impianox Sdn Bhd can be justified on sound principles. The figure of RM15m was arrived at after adjusting for bank loan debts of RM10m which remained payable and for other contingencies which, together with the bank debts, amounted to RM15m, and for the value of landed assets still retained by Metro Istimewa Sdn Bhd of RM13,283,275.

[53] The other heads of damages were likewise supportable on sound principles for quantification of damages. The loss of banking facilities attributable to the separate companies was calculated on the basis of interest at the rate of 8%pa on the actual loan amounts, as was the calculation for loss of possible profits for Metro Istimewa Sdn Bhd. We agreed that this was an acceptable method of calculation for loss of use of monies. See the Federal Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [2000] 2 MLJ 353.

[54] It was also submitted by counsel for the appellant that no damages could be awarded for inconvenience and embarrassment since companies cannot be injured in feelings. The learned judge rightly categorised this argument as without legal support. The short response to this particular submission is that the law now recognises corporate entities too can sue and recover for inconvenience, embarrassment and damage to reputation which will be reflected in its goodwill. This aspect of the law was correctly recognised by the learned trial judge.

CONCLUSION

[55] In summary, we were unanimous in finding that the sum of some RM17m awarded as damages on the undertaking to pay damages was warranted in the special circumstances of this case, where the appellant had

clearly and maliciously set out to cause maximum damage to the companies in the group. The causal link between the undertaking to pay damages and the damages of RM17,847,041.60 awarded by the deputy registrar and affirmed by the learned High Court judge was established in a factual matrix where the appellant had obtained the four interlocutory injunctions ex parte with deceit; in one glaring instance he had obtained one of the interlocutory injunctions on the basis of an action which had in fact been discontinued. This fact, as well as the fact that there was a settlement agreement between him and the first defendant, were kept hidden from the trial judge who heard the ex parte applications. We found in these circumstances no error in law or any failure of appreciation of the evidence on the part of the trial judge or the deputy registrar. The award was consistent with the principles adumbrated in persuasive cases such as *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* and *Sunseekers Pte Ltd v Joshua*, referred to earlier. We were also unanimous in finding the quantification of the damages was in accordance with established principles, in particular in calculating damages with reference to interest for loss of use of monies, such as approved by the Federal Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd*.

[56] For these reasons, we dismissed the appeal unanimously with fixed costs of RM50,000 for this appeal, the costs of the appeal in the High Court Kuantan and the costs for the assessment of damages by the registrar of the High Court, to be paid by the appellant to the respondents. The deposit of RM500 was ordered to be paid to the respondents.

[57] I have shown the draft judgment to my learned brother Datuk Clement Allan Skinner JCA and he has kindly agreed with it.

[58] My learned brother Dato' Abdul Malik bin Ishak JCA has since written a supporting judgment.

Appeal dismissed and sum of RM50,000 ordered as fixed costs.

Reported by Kohila Nesan